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No. 82-329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PETER ROMANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner has sought the granting of a writ of certiorari to review the June 24, 1982 judgment of the United States Court of Appeals for the Second Circuit upon the ground that his Sixth Amendment right to a public trial was violated by the trial court's locking of the courtroom doors—over defense objection—during the court's charge to the jury. Petitioner submits this brief reply to correct a factual error in Respondent's brief ("RB") and to succinctly demonstrate the inapplicability of the arguments made, and the legal precedents relied upon, by the Government.

ARGUMENT

The Government's Opposition to the Granting of Certiorari on Petitioner's Sixth Amendment Public Trial Point Runs Contrary to This Court's Decisions and the Long Tradition of Open Proceedings

1. Respondent argues in its brief that Petitioner was not denied his right to a public trial by the locking of the courtroom doors during the court's instructions to the jury because "no one was actually denied entrance to the courtroom" (RB 11). The record does not support this contention for two reasons.

First, the court's charge was given in two segments—before lunch (Tr. 1493-1539) and after lunch (Tr. 1551-81). Although the doors were locked at the beginning of each segment (Tr. 1493, 1551), the only effort by the trial judge to determine whether anyone tried to enter the courtroom during the charge occurred at the lunch break (Tr. 1540). There is absolutely no indication that various persons did not attempt to attend the second segment of the charge only to be barred by the courtroom's locked doors.

Second, at the lunch break the court asked the marshal: "Did anyone try to enter the courtroom while you were outside?" (Tr. 1540), and the marshal replied in the negative. There is no indication in the record as to whether the marshal was outside the locked door for all, some, or only a small portion of the time during which the court was charging the jury.

Thus, the Government's contention that no one tried to enter the courtroom during the charge is supportable only for such unknown portion of the pre-lunch segment of the charge as the marshal was outside the locked door. We submit that, in the absence of any reliable evidence either way on this point, this Court should consider this issue upon the basis of what is factually known and undisputed: that the trial court ordered the courtroom doors locked during its charge so as to bar the ingress or egress of any members of the public. Our suggestion is buttressed by the fact that it has long been held that a defendant need not make an affirmative showing of prejudice to establish

a violation of his right to a public trial. *See, e.g., United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978); *Davis v. United States*, 247 F. 394, 398-99 (8th Cir. 1917)

2. Relying upon *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978), as it was quoted in *Chandler v. Florida*, 449 U.S. 560, 569 (1981), the Government argues (RB 10-11) that the mere *opportunity* of *some* members of the public and the press to be present satisfied the Sixth Amendment. Because members of the public who arrived before the beginning of the charge and who were willing to be locked in the courtroom for the duration of the instructions—a duration of unannounced and uncertain length—were allowed to attend that portion of Petitioner's trial, Respondent claims full compliance with Petitioner's Sixth Amendment rights.

That argument contains two fallacies—one legal, the other factual. First, *Nixon v. Warner Communications, Inc.* did no more—insofar as it is relied upon in Respondent's brief—than uphold certain limitations on the *broadcasting* of a trial. There had been no limitation on the attendance by members of the public and the press at the trial in question—the so-called Watergate trial—but rather only limitations on the broadcasting of certain presidential tape recordings. Thus, Respondent's argument is completely unsupported by the precedent upon which it relies.

Second, most of the public generally has no way of knowing if and when a judge is planning to charge a jury. The locking of the courtroom doors excludes both those who, lacking knowledge of the court's schedule, have not arrived before the judge begins charging and also those who, for any number of reasons, may not be able to remain continuously inside the courtroom during the entire length of the charge—which in some cases will involve a commitment of two or three hours, or even more. Such a limitation on the public's access to a trial is completely at odds with both the centuries-long tradition and the many purposes of open and public trials so thoroughly discussed in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-75

(plurality opn.), 589-97 (concurring opn., Brennan, J.) (1980), and *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384-87 (majority opn.), 411-33 (concurring and dissenting opn., Blackmun, J.) (1979).

3. The Government also maintains (RB 11) that the closing of the courtroom during the charge "was a reasonable limitation on courtroom traffic and noise designed to eliminate distraction of the jury. . . ." We certainly do not dispute that the public trial right is subject to limitation in appropriate circumstances. We simply maintain that, as the Chief Justice recently said, speaking for a plurality of this Court in *Richmond Newspapers, Inc. v. Virginia, supra* at 581:

> Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. (Footnote omitted.)

In petitioner's case nothing approaching a finding of necessity[1] was articulated by the trial judge. He simply stated that the locking of the courtroom's doors had been the practice in the Southern District of New York since "the memory of man runneth not to the contrary." (Tr. 1491).[2]

4. Respondent has apparently misread the five state court cases upon which we relied and which we discussed at some length in our petition (pp. 4-6). Each of those cases found the

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1. The only case upon which Respondent relies in which a specific finding of necessity for closing the courtroom during trial was upheld—*United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966)—involved intimidation and harassment of witnesses by the defendant's family and friends and disruption of the proceedings by the defendant and a member of the audience. The contrast between such a showing and the virtual silence of the record in this case could not be clearer.

2. As we demonstrated in our petition (pp. 8-10) by way of our survey of various jurisdictions throughout the nation, more than half of those jurisdictions have found no need to lock their courtrooms during the charge to the jury, although the potential for minimal "distraction" of the jurors would seem to exist nationwide. Just as a defendant is not entitled to a perfect trial, we suggest that the Sixth Amendment's guarantee of a public trial cannot be defeated by any purported need for the perfect attention of the jury. Were that the case, *all* criminal trials would be held with courtroom doors locked whenever the jurors were in the jury box.

closings of the courtroom during the court's charge to the jury to be a serious violation of a defendant's right to a public trial.[3] Our argument is hardly a "frivolous" one.[4]

CONCLUSION

For the reasons stated above and in our petition, the writ of certiorari should be granted.

Respectfully submitted,

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3. It is true that two of the cases upon which we relied affirmed convictions because the public had in fact not been denied access to the courtroom during the charge and a third found a waiver of the point because of the defendant's failure to object. That the convictions in those cases were affirmed in no way diminishes those courts' legal conclusion: that the prohibition of public access to a criminal trial during the court's charge violates a defendant's right to a public trial.

4. We note that, in using that term (Pet. App. 12a), the Second Circuit had not had cited to it a single one of the cases which we have cited to this Court—the only American cases ever to deal with the issue.